Pacific Telephone and Telegraph Company *and* Richard Ebojo *and* George Flores. Cases 32-CA-852-1 and 32-CA-852-2

July 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, ZIMMERMAN, AND HUNTER

On October 23, 1978, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer thereto.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order as modified.[1]

We agree with the Administrative Law Judge's conclusion that the Respondent violated Section 8(a)(1) by refusing to inform employees Ebojo and Flores, or Green, their union representative, of the nature of the matter being investigated, as well as by refusing to allow them consultation with Green before their interviews.[2] The Administrative Law Judge correctly found that, under the Board's decision in *Climax Molybdenum Company, a Division of Amax Co., Inc.*,[3] employees have a Section 7 right to consult with their representative before any interview to which *Weingarten*[4] rights attach. She further found that, for the right to prior consultation to have any meaning, the employee and his representative must have some indication of the matter being investigated for, without it, there is nothing about which to consult.

Our dissenting colleague disagrees with the Board's holding in *Climax*, and would find no right to prior consultation and, therefore, no obligation on the part of an employer to inform employees as to the subject of the investigation. He views *Climax* as an unwarranted extension of the Supreme Court's decision in *Weingarten* and inconsistent with the Court's admonition that the right to a representative should neither transform the interview into an adversary proceeding nor interfere with legitimate employer prerogatives. We are unpersuaded.

In *Climax*,[5] the Board held that the *Weingarten* right encompassed the right of an employee to confer with his representative before any interview which the employee reasonably fears could result in discipline. The Board reasoned that the *Weingarten* right is ineffective without prior consultation since the representative is precluded from performing his envisioned role as a "knowledgeable" representative. Prior consultation, and the "knowledge" which results therefrom, enables the representative to "assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident."[6] At the same time, it enables the representative to counsel and assist the employee who may be "too fearful or inarticulate to relate accurately the incident being investigated."[7] As the Board stated in *Climax*, ". . . knowledge is a better basis than ignorance for the successful carrying on of labor-management relations." Also the representative can provide the "aid for protection" which the employee seeks. For these reasons, the Administrative Law Judge correctly found that the Respondent violated Section 7 by refusing to inform the employees of the nature of the matter being investigated. If the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation.

Contrary to our dissenting colleague, we view *Climax* and our decision herein to be fully consistent with, and required by, the *Weingarten* Court's interpretation of Section 7. Indeed, the act of "consultation" is no less "concerted activity for mutual aid or protection" than the act of "representation"

[1] The recommended Order and Notice have been modified to include the traditional language used by the Board to order reinstatement and backpay.

[2] Since the Administrative Law Judge discredited Flores' testimony that Green sought to consult with Flores before his interview, we would not find that the Respondent unlawfully refused to allow Flores to consult with Green.

[3] 227 NLRB 1189 (1977), enforcement denied 584 F.2d 360 (10th Cir. 1978).

[4] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[5] In denying enforcement of the Board's decision in *Climax*, the Court stated that "the NLRB has enlarged upon the *Weingarten* holding to the extent that it includes pre-interview situations," and did "not believe that *Weingarten* can be interpreted so broadly." We believe, however, that the Court's decision in *Climax* is readily distinguishable from the instant case. First, the Court found that no request for representation was made by the employees involved, although they had 17-1/2 hours between "summons" and interview to do so and could have consulted on their own time; that the employees, in fact, expressed no desire to have representation; and that public policy would not have been served by the union's admitted intention to advise the employees not to cooperate with their employer. In this case, on the other hand, not only did the questioned employees directly make a request for both information and representation to the Respondent, they also asked their union representative, as the Administrative Law Judge found, "what was going on? Green said that he did not know, he had received an unexplained summons also but he would get some information." Ebojo and Flores created an express agency relationship for purposes of information between themselves and Green at the point when Green became their "emissary," going beyond that of the Union's formal status.

[6] 420 U.S. at 263.

[7] *Id.*

itself.[8] It is likewise activity aimed at countering employer action which threatens the employee's terms and conditions of employment. Moreover, it need not interfere with legitimate employer prerogatives any more than the act of representation. When faced with an employee's insistence on concerted action, the employer is still free to reject the collective course and forgo the interview. Further, the employer controls the manner, form, and timing of its investigatory and disciplinary process and can take steps to protect its legitimate interests, while at the same time giving due regard to the exercise of Section 7 rights.

Nor does a requirement of prior consultation and information regarding the matter being investigated present any greater possibility of transforming the interview into an adversary proceeding. The employer, under *Weingarten*, has no obligation to bargain with the representative and "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."[9]

We emphasize that our construction of Section 7 does not, as our dissenting colleague suggests, require that an employer's investigatory or disciplinary process take on attributes even remotely akin to "full-scale criminal proceedings." All *Climax* requires is that, as a function of an employee's right to engage in concerted activity for mutual aid or protection, a preinterview consultation with his *Weingarten* representative be permitted. This consultation need be nothing more than that which provides the representative an opportunity to become familiar with the employee's circumstances. To require that the employer inform the employee as to the subject matter of the interview does not dictate anything resembling "discovery." The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A *general* statement as to the *subject matter* of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.[10]

Our dissenting colleague may feel that less chance for "obstructionist tactics" and "interference with employer prerogatives" would exist if both the employee and representative were kept unprepared and in the dark regarding the subject of the interview[11] and, *a fortiori*, a lesser chance if no representative were provided at all. What our colleague chooses to ignore is that the construction of Section 7 affirmed by the Supreme Court in *Weingarten* represents a balance between employer "prerogatives" in investigating and disciplining misconduct and the right of employees to band together when their terms and conditions of employment are threatened by those "prerogatives." The weight of an employer's investigatory machinery against the isolated employee is an imbalance which Section 7 was designed to eliminate and one which we cannot ignore.[12] As with the right to representation itself, access before the interview to a knowledgeable representative who can counsel and aid the employee as to the accusation in hand, as provided by Section 7, is a proper balance between the rights of employers and their employees "read in light of the mischief to be corrected and the end to be attained."[13]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Pacific Telephone and Telegraph Company, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer George Flores and Richard Ebojo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss

[8] Member Fanning views "prior consultation" as being neither different from, nor superior to, the right to representation itself. Rather, consultation is merely an "aspect of that function which enables the representative to fulfill his role." See Member Fanning's concurring opinion in *Climax*.

[9] 420 U.S. at 260. Cf. *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980), enforcement denied 667 F.2d 470 (5th Cir. 1982). See also *Texaco, Inc.*, 251 NLRB 633 (1980), enfd. 659 F.2d 124 (9th Cir. 1981).

[10] Here, the Respondent stated only that there was a "problem" involving two installers.

[11] This contention is speculative and, at best, dubious. As the Board noted in *Climax*, it is just as plausible that lack of consultation would "strongly incline an employee representative to those obstructionist tactics as a precautionary means of protecting employees from unknown possibilities." We also note that, given an interview conducted in due regard to Sec. 7 rights, an employee who refuses to cooperate acts at his peril, forgoing any possible benefit which could be derived therefrom.

[12] Here, the interview was conducted by security representatives. The *Weingarten* Court noted:

> There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. . . . These techniques increase not only the employees' feeling of apprehension, but also their need for experienced assistance in dealing with them. Thus often . . . an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. [420 U.S. at 265, fn. 10.]

This is no less true today.

[13] 420 U.S. at 262, citing *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944).

of earnings he may have suffered by reason of his suspension and discharge, plus interest."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER HUNTER, dissenting:

Relying on the Board's decision in *Climax Molybdenum Company, a Division of Amax, Inc.*,[14] the Administrative Law Judge concluded, and my colleagues agree, that Respondent violated Section 8(a)(1) of the Act by refusing to allow two employees to consult with their union representative prior to investigatory interviews which they reasonably believed would result in disciplinary action, and by refusing to inform the employees or their union representative, upon request, of the nature of the alleged misconduct that prompted the investigatory interviews. Since I believe *Climax* was wrongly decided and represents an unwarranted interference with legitimate employer prerogatives, I dissent from my colleagues' decision.

The facts, as more fully set forth by the Administrative Law Judge, are as follows. On February 28, 1978, installer/repairmen Richard Ebojo and George Flores were called in from the field and ordered to report to Respondent's 21st Avenue garage. Arriving separately, they each asked William Stapp, Respondent's customer service manager, the reason for their summons. According to both employees, Stapp refused to give a reason but asked each employee if he wanted union representation. They both said "yes" and were informed that a steward had already been called. According to Stapp, he informed both employees that they had been called in regarding an incident the previous week and that they were now waiting for the union steward to arrive. Stapp admitted that both employees requested additional information but that he had refused to respond to their request.

When Chief Union Steward Robert Green arrived, Ebojo and Flores asked him what was going on. Green told them that he did not know; he then went to see Stapp. Green testified that he received no answers from Stapp. Stapp testified that he told Green there was a "problem" regarding two installers and then directed him to an office where Jerome Helmuth, security representative, and John Milosovich, customer service manager, were waiting. Stapp then went to get Flores. Flores testified that Green returned to the area where he and Ebojo were waiting. He also testified that when Stapp came to get Flores for the interview, Green asked to speak to Flores, but Stapp refused that request. The Administrative Law Judge did not credit Flores' testimony that Green made any such request.

During Flores' interview, Milosovich stated that he had observed Flores carrying a telephone into Ebojo's house during working hours on February 20. Flores denied installing a telephone there but admitted installing a "modular connecting block" to Ebojo's telephone line. Upon the conclusion of the interview, Flores left and Stapp went to get Ebojo. Around that time, Green said he wanted to talk to Ebojo, but Helmuth said no, it would jeopardize the investigation. Green did not pursue this request. During Ebojo's interview, Milosovich asked Ebojo if Flores had installed a telephone at Ebojo's house on February 20. Ebojo admitted that Flores had fixed some wire but denied that Flores had installed a telephone. Ebojo claimed that he had only one telephone and that was an antique set.[15]

Upon their refusal to sign a statement, Stapp informed both employees that they were suspended pending dismissal. On March 6, 1 week later, Flores and Ebojo were again summoned to the garage, whereupon Stapp discharged them for unauthorized installation of equipment as well as for falsification of timesheets, an allegation which had been mentioned during Flores', but not Ebojo's, interview on February 28.

The Administrative Law Judge found that, under *N.L.R.B.* v. *J. Weingarten, Inc.*,[16] Flores and Ebojo had the right to insist on the presence of a union representative at interviews which they reasonably believed would result in disciplinary action, and that under the Board's decision in *Climax* they had the right to prior consultation with their union representative. She further found that they also had a right to be informed prior to the interview of the nature of their alleged misconduct because such a right "is inherent in the right to prior consultation." She reasoned as follows:

> The right to prior consultation has no meaning unless the employee and his union representative know the misconduct of which he is accused. Without such knowledge, there is nothing about which to consult. This is particularly true where, as here, there had been no previous confrontation or indication of employer displeasure. It is impossible under these circumstances for the union representative to "learn the [employee's] version of the events and to gain a familiarity with the facts" which the Board determined in *Climax* to be an inte-

[14] 227 NLRB 1189 (1977), Members Penello and Walther dissenting, enforcement denied 584 F.2d 360 (10th Cir. 1978).

[15] The record indicates that the installation of such a telephone without special authorization violated Respondent's work rules.

[16] 420 U.S. 251 (1975).

> gral part of the right to representation enunciated in *Weingarten*. As the Board stated in *Climax* "Knowledge is a better basis than ignorance for the successful carrying on of labor-management relations."

Thus, since she found that Respondent refused to apprise Flores, Ebojo, or their union representative, upon request, of the nature of the alleged misconduct prior to the interviews, and also refused to permit the union representative to consult with Ebojo prior to his interview, the Administrative Law Judge found that by such conduct Respondent violated Section 8(a)(1).

As I indicated previously, I do not agree with the underlying rationale of *Climax* and therefore I would not find Respondent's conduct violative of Section 8(a)(1). In *Climax*, the Board majority determined that, if a union representative is to represent employees effectively and be "knowledgeable" in eliciting the facts, as suggested by the Supreme Court in *Weingarten*,[17] those objectives would more readily be achieved if the representative had an opportunity to consult with the employee beforehand. The Board majority stated:

> These considerations indicate that the representative's aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand. To preclude such advance discussion, as our colleagues would, seems to us to thwart one of the purposes approved in *Weingarten*. Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation. [*Climax, supra* at 1190.]

The dissenting opinion, with which I agree generally, submitted that at no time did the Supreme Court indicate that the right to representation encompasses a right to prior consultation, and, moreover, that the Court's definition of a "knowledgeable union representative" was different from that of the Board; thus, according to the dissent, the employee has a right to a union representative who is "generally knowledgeable about grievance resolution—not necessarily one who is completely versed with the employee's particular version of the events . . . ."[18] The dissenters also argued that, although the Court in *Weingarten* was concerned with balancing the rights of employers and employees, the Board was now establishing an *imbalance* in favor of unions who "may view all such interviews as adversarial" and may bring "pressures to bear on an employee to withhold the facts."[19] Finally, the dissenters argued that, even if a right to prior consultation could be inferred from *Weingarten*, it would vest in the employee, not the union representative; thus, they would find no violation in *Climax* in any event, since it was the union representative and not the employees who requested the prior consultation.[20] The Tenth Circuit denied enforcement of the Board's decision, concluding that *Weingarten* could not be construed so broadly as to cover the situation presented in *Climax*.[21]

My disagreement with my colleagues derives primarily from the following passage in the Supreme Court's decision:

> A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. *Certainly his presence need not transform the interview into an adversary contest.*[22] [Emphasis supplied.]

In my view, by requiring prior consultation upon request, the Board encourages the very change in the essential nature of the interview that troubled the Supreme Court. Decisions such as *Climax* and

[17] 420 U.S. at 263.

[18] *Id.* at 1193.

[19] *Id.* at 1193.

[20] The majority answered these arguments by stating, *inter alia*, that greater "knowledgeability" would not alter the nature of the interview; that a union inclined to use obstructionist tactics could do so at the interview itself and may in fact be more inclined to do so if there is no prior consultation; and that the union must have the right to prior consultation in order to inform the employee of his rights to representation. In my view, the majority's response is at once speculative and conclusory.

[21] The circuit court noted that under *Weingarten* it is the employee who must request representation and pointed out that neither employee in *Climax* manifested any interest in consulting with his union representative prior to the investigatory interview, even though 17-1/2 hours passed between the time they were advised of the planned investigation and the time it actually occurred. Also noting that under *Weingarten* the right to union representation may not interfere with legitimate employer prerogatives, the circuit court found that the union's admitted policy of urging employee members not to cooperate with investigatory interviews was directly contrary to the primary factfinding purpose of such interviews. Accordingly, the court concluded that, in the circumstances, prior consultation would have interfered with legitimate employer prerogatives.

My colleagues find that the court's decision in *Climax* is "readily distinguishable," primarily on the basis that, unlike the employees in *Climax* who made no request for union representation, Flores and Ebojo made a request for both information and representation and asked their union representative "what was going on." Even granting that the facts here differ somewhat from those presented in *Climax*, I believe there is no basis in *Weingarten* for the proposition that consultation and notice of the charges is mandated whatever the particular factual context may be.

[22] 420 U.S. at 263.

the instant case set the stage for a change in the role of the union representative from that of fact-finder; i.e., one who would "assist the employer by eliciting favorable facts," to that of counsel, who would assist his "client," the employee, by arguing the facts presented in private by the employee. Since such a result is clearly contrary to the underpinnings of the Supreme Court's holding in *Weingarten*, I cannot join my colleagues in the majority in this decision.[23]

For much the same reasons, I cannot join in holding that *Weingarten* contemplates a "right" to be informed in advance of the subject matter of the investigatory interview, whether such a right be inherent in the "right" to prior consultation (which I reject) or whether it be viewed as an independent right. Not only does such a right have the same potential for transforming investigatory interviews into formalized adversary contests with all the attributes of full-scale criminal proceedings, it has the equally undesirable potential of interfering with legitimate employer prerogatives. I believe that for employers to conduct their businesses efficiently, they must be allowed the freedom to control the manner of conducting their investigatory interviews, so long, of course, as they comport with the requirements of *Weingarten* as these are properly interpreted by the Board. As Respondent pointed out in its brief, in most cases employers will routinely give the affected employee and the union a statement of the nature of the alleged misconduct. Nevertheless, there will be situations where an employer will have legitimate reasons for withholding such a statement until the start of the interview. In those situations, requiring the statement may actually hinder the investigation and impede the search for the truth. In my view, such a situation arose here. Faced with the fact that two employees were implicated together in the alleged misconduct, Respondent wished to prevent them from coordinating their stories in advance. Indeed, in the instant case Respondent explicitly stated to the union representative its concern that consultation between him and the employees would "jeopardize" its investigation. Surely an employer's wish to carry out his investigation without being unduly impeded is not unreasonable, nor, I might add, is it prejudicial to an honest employee.[24]

Finally, even if my colleagues would have it that, as a matter of fleshing out the *Weingarten* right to representation, the Supreme Court left to the Board's discretion questions such as prior consultation, notice, and the like, I believe that there are compelling policy reasons why the Board should not go beyond the *Weingarten* holding. Thus it seems clear to me that employees and employers have a mutually strong interest in ensuring that discipline is not predicated on anything less than a full and timely exposition of all the relevant facts, and often an important aspect of such a full investigation is the face-to-face interview. It seems equally clear that to the extent this Board impedes an employer's investigation of an incident by imposing additional requirements that turn an interview into a procedural minefield, we may well succeed only in persuading employers that the better course is to dispense with the interview altogether. I submit that such a result serves no party's interest, least of all that of the employee. Indeed, the employee may well find himself disciplined with no chance in a nonadversary setting to tell his side of the story, either on the merit of the allegations with which he is confronted, or in mitigation of the punishment which may be levied. Obviously, such a result would unnecessarily hurt the employee and be counterproductive to the protections afforded by the *Weingarten* decision.

In the final analysis, adequate representation for the employee who reasonably fears discipline, as well as for the entire bargaining unit, is assured by the presence of the union representative *at the actual interview*. In the instant case, a union representative was present at all times during Flores' and Ebojo's interviews. Nothing more is required under *Weingarten*, and nothing more should be required of an employer by the Board. Accordingly, I dissent from the finding of a violation and would dismiss the complaint in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice

[23] Another factor, though less significant, in my decision is the likelihood that a requirement of prior consultation will delay the factfinding process and cut into production time, which is also contrary to the Supreme Court's objectives.

[24] Important considerations such as the need to ensure the safety or security of his facilities or of his personnel may well mandate that an employer bring his investigation to a speedy conclusion.

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to permit employees to consult with their union representatives prior to investigatory interviews which they reasonably believed would, and which did, result in disciplinary action; or refuse to inform employees or their union representatives, upon their request, of the nature of the alleged misconduct which prompted such investigatory interviews.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer George Flores and Richard Ebojo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make each of them whole for any loss of earnings they may have suffered by reason of their suspension and discharge, plus interest.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was heard before me in Oakland, California, on September 11, 1978. The charge in Case 32-CA-852-1 was filed by Richard Ebojo, an individual, and a copy thereof was served on Pacific Telephone and Telegraph Company, herein called Respondent, on April 14, 1978. The charge in Case 32-CA-852-2 was filed by George Flores, an individual, and a copy thereof was served on Respondent on April 14, 1978. The consolidated complaint, which issued on June 30, 1978, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act.

The basic issue herein is whether Respondent violated the Act by refusing to inform Ebojo and Flores, or their union representative, of the nature of the charges being investigated and refusing to allow them prior consultation with their union representative regarding such charges.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, with an office and place of business located in Oakland, California, is engaged in the operation of a telephone and telegraph system. Respondent, in the course and conduct of its business operations, during the 12-month period preceding the issuance of the complaints herein, purchased and received goods or services valued in excess of $50,000, which originated outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is now and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Communications Workers of America, Local 9415, AFL-CIO, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent is party to a collective-bargaining agreement with the Union which provides that, at the request of the employee, a union representative may be present at any meeting between a representative of the Company and an employee in which discipline is to be announced. A statement of policy issued to department heads sets forth Respondent's interpretation as to its obligation to permit union representation at disciplinary and investigatory interviews, and to permit prior consultation between the employee and the union representative. This proceeding arose out of investigatory interviews involving employees George Flores and Richard Ebojo.

Flores and Ebojo were employed by Respondent from September 1971 and June 1968, respectively, until they were discharged on March 6, 1978.[1] At the time of their termination they were both classified as installer/repairmen and worked under the immediate supervision of Ralph Owens, plant service foreman. Owens reported to William Stapp, customer service manager, installation.

On Tuesday, February 28, when they were in the field working, both Flores and Ebojo were ordered to report to Respondent's 21st Avenue garage. It is not disputed that such a summons was an unusual occurrence. Flores and Ebojo arrived at the garage separately. In individual conversations with Stapp they both inquired why they had been summoned. According to them, Stapp refused to tell them, but asked if they wanted union representation. They both said yes, and Stapp informed them that a union steward had been summoned. According to Stapp, he told each of them that he had been called in regarding an incident which occurred the previous week. He admits that each of them requested additional informa-

[1] All dates herein will be in 1978 unless otherwise indicated.

tion, which he refused to give. Stapp further testified that he volunteered the information that the union steward had been summoned.

Shortly thereafter Chief Union Steward Robert Green arrived. In the meantime, though placed in separate offices, Flores and Ebojo had each noticed the other's presence and discussed their summons to the garage, but neither of them knew why. When Green arrived, they asked him what was going on. Green said he did not know, he had received an unexplained summons also but he would get some information.

Green then went to Stapp and asked what was going on. According to Green this occurred in an office in the presence of John Milosovich, customer service manager, and Jerome Helmuth, security representative. According to Stapp, it occurred in the driveway between the offices. Green testified that he received no answer. Stapp testified that he told Green that there was a problem regarding two installers and directed Green to an office where Helmuth and Milosovich were waiting. Stapp then went to Flores and escorted him to that office. Both Flores and Ebojo testified that Green returned to the office where they were waiting and said that Stapp and Milosovich would not tell him what was going on, because, they claimed, it would jeopardize the investigation. Green testified that he does not remember returning to the office where Flores and Ebojo were waiting.

Flores testified that Stapp came in and escorted him and Green to an office where Helmuth and Milosovich were present. According to Flores, as they walked over to this office, Green asked Stapp if he could speak with Flores. Stapp said no. However, Stapp denies this conversation, Green does not recall it, and Flores did not mention this in his prehearing affidavit dated April 27, 1978, although he admits that the investigator to whom he gave the statement specifically asked him if he or Green ever requested an opportunity to meet alone. In the circumstances, I do not credit Flores' testimony that, prior to his interview, Green requested an opportunity to meet with him alone.

As the interview with Flores proceeded, Flores was questioned as to why he had been at Ebojo's house on the afternoon of February 20 during working hours. Milosovich stated that he had observed Flores carrying an instrument (telephone) into Ebojo's house. Flores denied this but admitted that he had stopped by Ebojo's house on his coffeebreak,[2] and at Ebojo's request had installed a modular connecting block[3] to Ebojo's telephone line. He had no installation order for this service nor did he report it to the business office.[4]

Some reference was also made to Flores' timesheets[5] and Green examined the timesheets. At this time, according to Green's undenied testimony, he explained that sometimes an installer gets ahead of the work and the timesheet is not always accurate.

According to Green, at the conclusion of the Flores interview, he said he wanted to talk to Ebojo. Helmuth said no, it would jeopardize the investigation. Green said okay and did not pursue the matter further. Milosovich and Helmuth deny hearing such a request. So does Stapp.

Although Green testified that Stapp was present when he made the request, he is uncertain as to whether Flores was present. He also testified that the request was made after the conclusion of the Flores interview and before the Ebojo interview commenced. It is undisputed that, at the conclusion of the Flores interview, Stapp left with Flores and returned with Ebojo. Thus it is possible that Flores and Stapp had left or were leaving when Green made the request and thus did not hear the request. This is particularly true since Helmuth allegedly answered even though Stapp seemed to take the initiative in conducting the interviews. At the conclusion, Helmuth sumarized the evidence.

I credit Green that he requested to meet with Ebojo alone and that this request was denied. He impressed me as an honest, reliable witness who was attempting to answer questions candidly. He is still in Respondent's employ and at the time of the hearing was assigned to a temporary supervisory position which admittedly might or might not lead to a permanent supervisory position.

Following the Flores interview, Ebojo was brought into the office. Milosovich asked him about Flores' visit to his home on February 20. Ebojo admitted that Flores had been there. Stapp asked if Flores had installed a telephone there. Ebojo said no. Milosovich said he saw Flores carry a telephone into Ebojo's house and that, on the following day, a capacity reading was obtained from Ebojo's telephone line which indicated that three telephones were in use.[6]

Ebojo said he had only one telephone, an old 202 subset made in the 1920's or 1930's[7] and suggested that they accompany him to his house to verify this. Stapp, Helmuth, and Green did accompany Ebojo to his house but located only the one instrument. When they returned to the garage, Flores and Ebojo were asked to sign a statement. Upon Green's advice, they both refused. Stapp instructed them to turn in their identification cards and garage keys and informed them that they were suspended pending dismissal.

On March 6, Flores, Ebojo, and Green were again summoned to the 21st Avenue garage. Stapp reminded Flores that, at the time of the February 20 incident, he had been on final warning for falsification of his time-

[2] It is undisputed that installers may stop for a coffeebreak within a reasonable radius of their work assignment. According to Flores, his stop at Ebojo's house took him only two blocks off his route. However, in his report to his superior, Stapp described the distance as about 20 blocks from where Flores' timesheet indicated he should have been.

[3] A modular connecting block is a 2- by 2-inch device that connects the telephone to the outside telephone wires leading into the building.

[4] It is undisputed that a repairman already at a location may install such an item for safety purposes (according to Flores, there was a bare wire where Ebojo wanted him to install the block) without having a service order. Stapp testified that if it involved repair work, the repairman should fill out a repair ticket and, if it involved an installation, he should call the business office and get a service order issued. He further testified that if installation of a modular block was the sole item on the service, there would be a charge to the subscriber.

[5] Timesheets show the job location, the time spent on a particular job, and the travel time to the job. Thus, the beginning time for a particular job would be the completion time of the previous job. The timesheet does not show coffeebreaks.

[6] Ebojo was authorized only one telephone.

[7] It is undisputed that this was not the authorized set.

sheet[8] and informed him that he was being discharge for falsifying his timesheet of February 20 and for the unauthorized installation of equipment in Ebojo's residence. Ebojo was informed that he was being discharged for falsification of time reporting on February 21,[9] and for having the modular connecting block and the 202 subset installed in his residence without proper authorization.

B. *Conclusion*

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by denying the requests of Ebojo and Flores to be informed of the purpose of an interview, the subject of which was disciplinary action, and to engage in consultation with their union representative prior to the commencement of such interviews. Respondent contends that the facts do not support this contention and that, even if they did, this theory of a violation is an unwarranted extension of *N.L.R.B.* v. *Weingarten, Inc.*, 420 U.S. 251 (1975), and *Climax Molybdenum Company, a Division of Amax, Inc.*, 227 NLRB 1189 (1977).

In *Weingarten*, the Surpeme Court upheld the Board's determination that, under Section 7 of the Act, an employee has the right to insist on the presence of a union representative at an interview which the employee reasonably believes will result in disciplinary action.

In *Climax*, the Board determined that this right encompasses the right to prior consultation with the union representative. In setting forth its rationale, the Board stated:

> . . . [T]he Supreme Court in *Weingarten* noted:
>
> > A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. [*Weingarten, supra* at 262–263.]
>
> Surely, if a union representative is to represent effectively an employee "too fearful or inarticulate to relate accurately the incident being investigated" and is to be "knowledgeable" so that he can "assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident," these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. Additionally, a fearful or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action. These considerations indicate that the representative's aid in eliciting the facts can be performed better, and perhaps only if he can consult with the employee beforehand. To preclude such advance discussion, as our colleagues would, seems to us to thwart one of the purposes approved in *Weingarten*. Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation . . . .

Here the circumstances of the summons to the garage certainly gave Flores and Eoojo reasonable cause to believe that some disciplinary action was being considered and the interviews did actually result in Stapp recommending their discharge, which recommendation was followed. The critical question is whether they had a right to be informed prior to the interview of the nature of the alleged misconduct which prompted the interview. I conclude that the right to be so informed is inherent in the right to prior consultation.

The right to prior consultation has no meaning unless the employee and his union representative know the misconduct of which he is accused. Without such knowledge, there is nothing about which to consult. This is particularly true where, as here, there had been no previous confrontation or indication of employer displeasure. It is impossible under these circumstances for the union representative to "learn the [employee's] version of the events and to gain a familiarity with the facts" which the Board determined in *Climax* to be an integral part of the right to representation enunciated in *Weingarten*. As the Board stated in *Climax*, ". . . knowledge is a better basis than ignorance for the successful carrying on of labor-management relations."

I further find that these employees sought such information and were refused. Even crediting Stapp, a mere response that the interviews would concern an incident which occurred the previous week is not sufficient information. This is particularly true where, as here, the employees involved worked alone and have regular dealings with customers, any one of whom might have accused the employee of anything.

As indicated above, I credit Green that he requested, and was refused, prior consultation with Ebojo. Respondent argues that, even crediting Green, the fact that Ebojo and Green nevertheless submitted to the interview constituted a waiver of such right. I find no merit in this argument. If one considers simply the failure to pursue the requests, this is insufficient to support an inference of waiver. Green had every reason to expect that further requests would be futile. The previous refusals to give any information as to the incidents involved clearly indicated that Respondent did not intend to permit any meaningful consultation.

[8] Flores had previously been suspended three times for falsification of his time record.

[9] On this date Ebojo was observed at his home at 11:45 a.m. He was observed leaving his home at 12:40 p.m. His timesheet indicates that he was at a job location until 12 noon and that he took 30 minutes for lunch. This incident was not mentioned during the February 28 interview.

Nor does the failure of the employees to avail themselves of the right under *Weingarten* to refuse to participate in the interviews constitute a waiver of their right to prior consultation. Respondent never informed them of this right and before inferring that such right has been waived, it must be shown that the employee acted knowingly and voluntarily. *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977). For the reasons set forth above, it is apparent that these employees did not act knowingly. *Climax* also involved a situation where employees submitted to an interview notwithstanding the denial of the request for prior consultation. Nevertheless, the Board found a violation.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by refusing to permit union representatives to consult with Flores and Ebojo prior to investigatory interviews which they reasonably believed would, and did, result in disciplinary action; and by refusing to apprise Flores and Ebojo or their union representative, upon their request, of the nature of the alleged misconduct which prompted such investigatory interviews.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to permit employees to consult with their union representatives prior to investigatory interviews which they reasonably believed would, and which did, result in disciplinary action; and by refusing to inform employees or their union representatives, upon their request, of the nature of the alleged misconduct which prompted such investigatory interviews, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Since I have found that Respondent unlawfully refused to permit Ebojo and Flores prior consultation with their union representative, and refused to inform them of the nature of the alleged misconduct which prompted the investigatory interviews, the General Counsel requests a reinstatement and backpay remedy. Respondent argues that, inasmuch as discipline was imposed because of the misconduct which prompted the investigatory interview rather than because the employees asserted a right protected under the Act, a reinstatement and backpay remedy would be inappropriate, that it would unfairly penalize the Company and award the employees with an undeserved benefit. In support thereof, Respondent argues that, in *Climax*, the Board did not order that the oral warnings be removed from the employees' files, nor was reinstatement ordered in *Detroit Edison Company*, 218 NLRB 61 (1975), or *Mobil Oil Corporation*, 196 NLRB 1052 (1972). However, reinstatement and backpay was ordered in *Southwestern Bell Telephone Company, supra*, and revocation and expungement of a disciplinary layoff notice was ordered in *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977).

The Board has not explained its rationale for this variation in remedy. *Climax* postdates *Weingarten* and *Mobil Oil* was cited with approval in *Weingarten*. I conclude that the better approach is that in *Southwestern Bell Telephone* and *Certified Grocers*. If the right to union representation at investigatory interviews is the basic right described in *Weingarten*, and if the right to prior consultation is as essential to effective representation as determined by the Board in *Climax*, then one can only conclude that such representation, if granted, might possibly affect the outcome of such interviews. Since Respondent's conduct has caused the uncertainty as to what this effect would have been, it is only fair that the uncertainty be resolved against Respondent. The status quo cannot otherwise be restored. Union representation at this stage would likely be ineffective. The Supreme Court stated in *Weingarten* when it rejected Respondent's contention that representation should be deferred until the filing of a formal grievance following the imposition of disciplinary action:

> . . . at that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifing his actions than re-examining them.

This would seem to be even more likely in the situation here. Accordingly, it is recommended that Respondent offer Richard Ebojo and George Flores immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered as a result of his suspension on February 28, 1978, and his discharge on March 6, 1978, with interest thereon, to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Pacific Telephone and Telegraph Company, Oakland, California, its officers, agents, successors, and assigns, shall:

[10] See, generally, *Isis Plumbing & Heating Co.*, 136 NLRB 716 (1962).

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to permit employees to consult with their union representatives prior to investigatory interviews which they reasonably believed would, and which did, result in disciplinary action; and refusing to inform employees or their union representatives, upon their request, of the nature of the alleged misconduct which prompted such investigatory interviews.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Offer George Flores and Richard Ebojo immediate and full reinstatement to their former or substantially equivalent jobs and make them whole for any loss of earnings they may have suffered by reason of Respondent's discrimination against them in the manner and to the extent set forth in the section here entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(c) Post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."